



Local Road Wetland Replacement Program: Status and Management Plan

October 27, 2016

Overview

Minnesota Statutes 103G.222, subdivision 1(m) exempts certain road projects of counties, cities and township from the replacement requirements of the Wetland Conservation Act (WCA). This provision further requires the Board of Water and Soil Resources (BWSR) to replace the wetlands impacted by local government transportation projects on existing roads.

Funding to meet this legal obligation has most often been provided by bond funds; the funds appropriated since the establishment of this program in 1996 is shown below.

1996-97	\$3.00 million
1998-99	\$2.75 million
2000-01	\$4.30 million
2002-03	\$3.00 million
2004-05	\$4.36 million
2006-07	\$4.20 million
2008-09	\$3.48 million
2010-11	\$2.50 million
2012-13	\$6.00 million
2013-14	\$2.00 million
TOTAL	\$35.59 million

In preparation for the 2016 legislative session and the expected bonding bill, BWSR developed a long-term funding plan for the LRWRP to provide for ongoing solvency. This proposal called for \$10.33 million in 2016, \$10.84 million in 2018, and \$10.50 million in 2020. Ongoing funding after 2020 would require approximately \$5.0 million every year. The goal of this plan is to repay an existing debt to the Minnesota Department of Transportation (MnDOT) of \$1.7 million and result in a 3-year balance of credits to provide stability and assurances to local road authorities and the U.S. Army Corps of Engineers (Corps) that this program would continue to provide replacement wetland credits as required by law.

The capital budget bill that was being considered as the 2016 session adjourned included a \$5.00 million appropriation for this program. However, this amount was less than half that requested by BWSR. The pattern of providing less (often much less) funding than requested (see table below) was repeated with this legislation.

Year	Agency Capital Budget Request	Appropriation
2008	\$8,500,000	\$3,480,000
2010	\$8,420,000	\$2,500,000
2012	\$13,100,000	\$6,000,000
2014	\$5,400,000	\$2,000,000
2016	\$10,300,000	\$0

Project delays and cost increases for local road authorities are likely to result from inadequate LRWRP funding. Although under State rules LRWRP-eligible projects may be constructed prior to replacement of wetland impacts, projects requiring authorization under Section 404 of the Clean Water Act (Section 404) must provide adequate replacement prior to construction. Because most projects do require a Section 404 permit, most local road authorities will have to provide their own wetland replacement to satisfy Section 404 permit conditions if the LRWRP is inadequately funded to provide this wetland replacement in advance of impacts. This will result in local road authorities spending time and money to acquire private bank credits to purchase or developing their own wetland replacement sites. BWSR's obligation to replace wetland impacts for qualifying projects has little meaning if funds are not provided and local road authorities are forced to provide their own replacement in order to meet federal permit requirements.

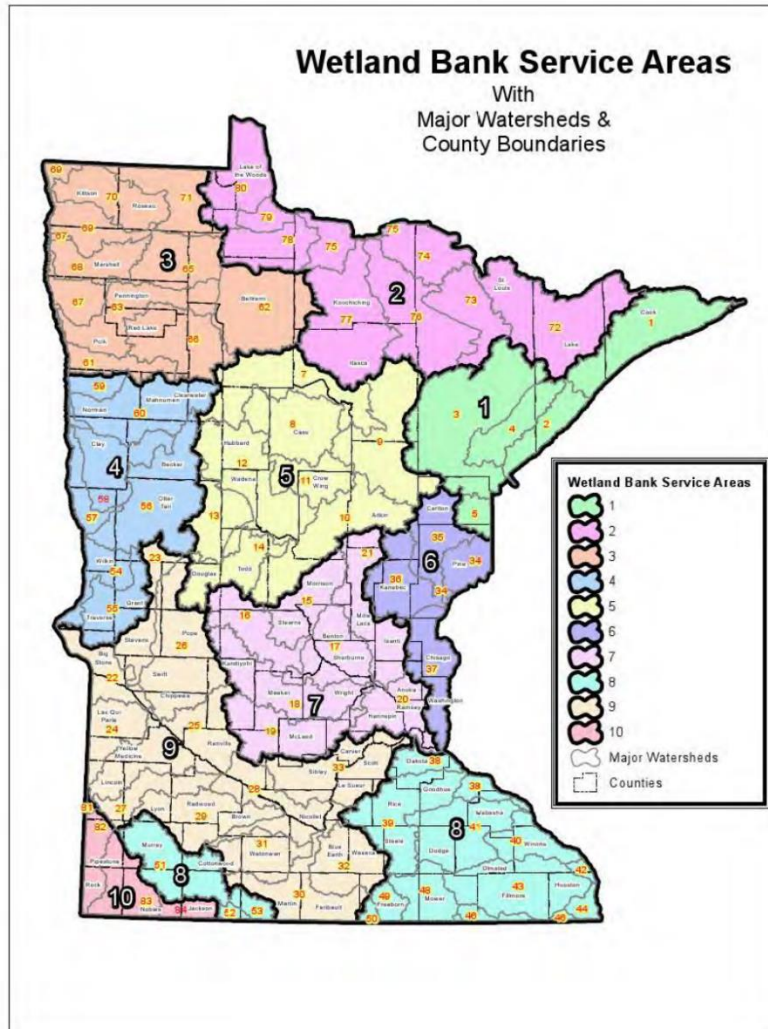
There are potential future implications for MnDOT projects as well. BWSR has a cooperative agreement with MnDOT whereby our agencies cooperatively develop and trade wetland credits as needed to accommodate both LRWRP and MnDOT wetland replacement needs. Without new and increased funding, BWSR's ability to effectively meet our obligations under the agreement will be compromised and the debt to MnDOT cannot be satisfied.

Status

The availability of Corps-approved wetland credits as of September 2016 and the projection of credit demand and need (based on past use) through the end of this calendar year is presented in the following table:

Bank Service Area	Available Credits September 2016	Projected Additional Credits thru July 2017	Projected Annual Credit Need	Projected Credit Balance July 1, 2017
1	4	0	7	-3
2	0	51	7	44
3	36	0	29	7
4	0	0	10	-10
5	55	0	22	33
6	0	0	13	-13
7	12	16	50	-23
8	13	63	5	71
9	0	15	28	-13
TOTAL	120	145	171	93

There are currently no credits available in four of the nine bank service areas (BSAs) and a forecasted deficit in an additional BSA by July 1, 2017 (the locations of the bank service areas are shown on the figure on the following page). Credit shortfalls in these BSAs are currently being addressed by using credits from other BSAs. This practice is not sustainable because (1) the credits from other BSAs are debited at a higher ratio which increases the program cost of the replacement relative to the impact and draws down the balance in the BSAs with credits at a faster rate; and, (2) it conflicts with federal policy that prioritizes replacement based on a watershed approach. To date, the Corps has not objected to the practice but it is uncertain if it will be allowed to continue indefinitely.



LRWRP BSA and Credit Management Plan

As future funding remains uncertain and to ensure the LRWRP makes the most effective use of available wetland credits, short and long-term measures will be implemented to manage remaining LRWRP credits, communicate LRWRP status, and establish a process for continual LRWRP evaluation and reporting.

I. Closing of Wetland Bank Service Areas

On December 2, 2016, the following LRWRP changes will take effect:

- (1) Wetland replacement to satisfy federal or state permit or other regulatory requirements, through the LRWRP will be provided on a watershed basis using the BSA boundaries. Replacement credits from one BSA will not be used to replace impacts in another BSA except in very rare circumstances (see paragraph 2 in this section). Wetland replacement will not be provided for county, city and township road projects in BSAs that have a balance of zero wetland credits.

(2) Wetland replacement for county, city and township road projects in BSAs with a positive wetland credit balance will continue to be provided so long as credits are available in that BSA. In order to have wetland replacement provided through the LRWRP a county, city or township must have obtained an eligibility determination reviewed and confirmed by a technical evaluation panel (TEP). Upon receipt of the TEP eligibility determination, BWSR will reserve the identified amount and type of wetland credit and await confirmation from the federal or state regulatory authority that the reserved credits will satisfy their requirements. If any changes in the amount or type of wetland credit are required, BWSR will coordinate with the federal or state regulatory authority and provide verification of the final transaction amounts. Once a permit or other regulatory approval is issued the credits will be formally debited from the bank and verification of the transaction provided to the regulatory authority. If a federal or state permit or other regulatory approval is required for the work in wetlands, the permit or approval must be issued or verified within 120 days of BWSR's receipt of the TEP determination or the credits will be returned to the pool for that BSA.

In the event that a BSA has some, but not all, of the required replacement credits for a particular project BWSR will use all of the remaining credits in the BSA of impact and provide credits from another BSA for the balance of the required replacement so that the project can be permitted and constructed in its entirety.

If the supply of replacement credits in a particular BSA were to be exhausted before the annual review (see Section II), BWSR will take action to close that BSA for use in the LRWRP using the process provided in Section III. Similarly, if replacement credits become available in a BSA that is closed, BWSR will take action using the process in Section III to open the BSA to provide replacement for eligible projects.

Closure of BSAs to the use of BWSR-supplied wetland credits does not affect the process by which local road authorities apply and report qualifying impacts to BWSR, or the process for TEP eligibility review for the LRWRP. Local road authorities must continue to submit project information in accordance with MN Rule 8420.0544 regardless of credit availability. BWSR will also continue to track qualifying road projects in closed BSAs. If, in a closed BSA, sufficient credits become available to where the BSA can be re-opened under the LRWRP, BWSR will first provide mitigation for those eligible projects that have not yet secured alternative mitigation under an approved Corps' permit, in the order they were received by BWSR.

BWSR will provide initial and ongoing notification to counties, cities, townships and federal and state regulatory authorities regarding the status of the LRWRP, including BSAs where wetland replacement will continue to be provided.

II. Annual LRWRP and BSA Evaluation

BWSR staff will periodically review the status of individual BSAs every July and update the LRWRP status as necessary by August 31. These BSAs may be opened and/or closed for wetland replacement using the process provided in Section III based on the staff evaluation of the LRWRP and a forecast of expected credits and debits over the next twelve month period. The BWSR Wetland Conservation Committee will be informed of the annual LRWRP evaluation.

III. Process for BSA and Credit Management

BSAs where available credits are approaching zero will be added to the list of closed BSAs following the process below. Alternatively, BSAs where credits are expected to be deposited may be opened to provide replacement for eligible local government road projects. The following process will be used in evaluating the LRWRP and individual BSAs and in decision-making for opening and/or closing individual BSAs:

1. The Wetland Bank Coordinator will review LRWRP and individual BSA status;
2. Based on this review, the Wetland Bank Coordinator will consult with the Wetland Section Manager on the LRWRP and make a recommendation, as necessary, to the Executive Director;
3. The Executive Director will consider the staff recommendation and decide whether to open and/or close any BSAs;
4. The Board Wetland Conservation Committee will be informed of the Executive Director's decision; and
5. Local road authorities and state and federal regulatory authorities will be notified of changes to the status of any BSAs.

Appendix.

Mn Statutes 103G.222, Subdivision 1, (l) and (m):

(l) For projects involving draining or filling of wetlands associated with a new public transportation project, and for projects expanded solely for additional traffic capacity, public transportation authorities may purchase credits from the board at the cost to the board to establish credits. Proceeds from the sale of credits provided under this paragraph are appropriated to the board for the purposes of this paragraph. For the purposes of this paragraph, "transportation project" does not include an airport project.

(m) A replacement plan for wetlands is not required for individual projects that result in the filling or draining of wetlands for the repair, rehabilitation, reconstruction, or replacement of a currently serviceable existing state, city, county, or town public road necessary, as determined by the public transportation authority, to meet state or federal design or safety standards or requirements, excluding new roads or roads expanded solely for additional traffic capacity lanes. This paragraph only applies to authorities for public transportation projects that:

(1) minimize the amount of wetland filling or draining associated with the project and consider mitigating important site-specific wetland functions on site;

(2) except as provided in clause (3), submit project-specific reports to the board, the Technical Evaluation Panel, the commissioner of natural resources, and members of the public requesting a copy at least 30 days prior to construction that indicate the location, amount, and type of wetlands to be filled or drained by the project or, alternatively, convene an annual meeting of the parties required to receive notice to review projects to be commenced during the upcoming year; and

(3) for minor and emergency maintenance work impacting less than 10,000 square feet, submit project-specific reports, within 30 days of commencing the activity, to the board that indicate the location, amount, and type of wetlands that have been filled or drained.

Those required to receive notice of public transportation projects may appeal minimization, delineation, and on-site mitigation decisions made by the public transportation authority to the board according to the provisions of section [103G.2242, subdivision 9](#). The Technical Evaluation Panel shall review minimization and delineation decisions made by the public transportation authority and provide recommendations regarding on-site mitigation if requested to do so by the local government unit, a contiguous landowner, or a member of the Technical Evaluation Panel.

Except for state public transportation projects, for which the state Department of Transportation is responsible, the board must replace the wetlands, and wetland areas of public waters if authorized by the commissioner or a delegated authority, drained or filled by public transportation projects on existing roads.

Public transportation authorities at their discretion may deviate from federal and state design standards on existing road projects when practical and reasonable to avoid wetland filling or draining, provided that public safety is not unreasonably compromised. The local road authority and its officers and employees are exempt from liability for any tort claim for injury to persons or property arising from travel on the highway and related to the deviation from the design standards for construction or reconstruction under this paragraph. This paragraph does not preclude an action for damages arising from negligence in construction or maintenance on a highway.